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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/536,528	12/02/2005	Barrie Edward Frost	RD 442	2207
22884 7590 01/08/2009 MIDDLETON & REUTLINGER 2500 BROWN & WILLIAMSON TOWER LOUISVILLE, KY 40202				
EXAMINER FITZGERALD, JOHN P				
ART UNIT 2856		PAPER NUMBER		
MAIL DATE 01/08/2009		DELIVERY MODE PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/536,528

Applicant(s)

FROST, BARRIE EDWARD

Examiner

JOHN FITZGERALD

Art Unit

2856

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-36 and 38 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-36 and 38 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 31 October 2007 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/5508)
Paper No(s)/Mail Date 5/25/06

- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date: ____
- 5) ☐ Notice of Inventor's Patent Application
- 6) ☐ Other: ____

DETAILED ACTION

Drawing Objections

1. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the “flexible tubing” must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as “amended.” If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either “Replacement Sheet” or “New Sheet” pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claims 3 and 32 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. As to claim 3, the terms "sensor(s)" and "transducer(s)" are synonymous to one another and are employed in the art as equivalents, thus the claim fails to further limit or further define previous claims, thus rendering the claim indefinite. As to claim 32, it recites the limitation "the puffing profile" in line 2. There is insufficient antecedent basis for this limitation in the claim.

Double Patenting

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

5. Claims 1-36 and 38 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-28 of U.S. Patent No. 7,100,420. Although the conflicting claims are not identical, they are not patentably distinct from each other because claim 1 of the '420 patent recites all of the same elements of instant claim 1 except for a signal conversion means operable to convert signals from the fluid flow pressure drop detection means and smoke density detection means into data. Clearly, all measurement and testing devices, either contained with the measurement device itself, or located in a separate processing unit (i.e. computer/laptop (instant claim 27), have signal conversion means, i.e. analog-to-digital (A/D) processors of data acquisition units, that convert raw electrical voltages/currents generated by the sensors/transducers, and as such, are obvious to one of ordinary skill in the art, if not, in fact, inherent features of any testing or measuring system. Claims 4, 9, 13 of the '407 patent disclose locations various locations of the display/data receiving means. As such, the placement/location of data acquisition and/or data processing/conversion means running a suitable program, and an associated display of the measured/converted data in any desired location (as recited in instant claims 4, 18-25, 28 and 38) would have been obvious to one having ordinary skill in the art based on design choice/need. As to claims 2 and 7, clearly the invention recited in the '402 patent holds a smoking article (i.e. mounting means), and inherently has two ends in which to hold the smoking article, thus two openings, to measure a pressure drop/differential. Orifices are common flow altering elements. The measurement of absolute or gauge pressure (referenced against atmospheric pressure) (instant claim 7) is an obvious design choice of one of ordinary skill in the art. As to claims 3 and 6, a pressure sensor is synonymous with a pressure transducer, and any suitable type of sensor/transducer is an obvious choice to one having ordinary skill in the

art based on sensitivity/resolution as well as size/power constraints. As to claim 5, the independent claims of the '407 patent recite that the pressure sensors/transducers are located in the mounting means. As to instant claims 8-15, '407 patent discloses a smoke density detection means, which includes a light emitter and receiver and subsequent processing of the signal generated/received. It would have been obvious to one having ordinary skill in the art at the time the invention was made to employ an LED operating at any desired wavelength and/or frequency and any standard type of detector (i.e. photodiode) at any desired distance, based on desired detection parameters and smoke density to be measured and operating specifications/conditions of the detector itself. As to claim 16, the limitation of making a device 'portable' is well within the capabilities of one of ordinary skill in the art. As to instant claims 26 and 34-36, claims 2, 5, 7, 8 and 20 recite data transmission via conductorless electromagnetic wave means, thus meeting these limitations. Furthermore, transfer of data wirelessly or via a conductor/wire are obvious and known methods and means in the art. As to the remaining instant claims, the creation of a puff profile, or any aspects thereof (i.e. shape, volume, etc.) based on the measured data are well within the ordinary skill level in the art and an obvious variant of the invention disclosed in the '407 patent.

Conclusion

6. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Applicant is invited to review PTO form 892 accompanying this Office Action listing Prior Art relevant to the instant invention cited by the Examiner.
7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to John Fitzgerald whose telephone number is (571) 272-2843. The

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examiner can normally be reached on Monday-Friday from 7:00 AM to 3:30 PM. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Hezron Williams, can be reached on (571) 272-2208. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/John Fitzgerald/
Examiner, Art Unit 2856
1/5/09